



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Charles R. Spies, Esq.
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Clark Hill PLC
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FEB 26 2018

RE: MUR 6860

Dear Messrs. Spies and Tyrell:

On August 15, 2017, the Office of the General Counsel ("OGC") mailed to you a General Counsel's Brief setting forth the factual and legal basis upon which OGC was prepared to recommend that the Commission find probable cause to believe that your clients violated provisions of the Federal Election Campaign Act of 1971, as amended. Specifically, the brief recommended that Dan Hibma violated 52 U.S.C. § 30116(a)(1)(A), that Terri Lynn Land and Terri Lynn Land for Senate and Kathy Vosburg in her official capacity as treasurer violated 52 U.S.C. § 30116(f), and that Terri Lynn Land for Senate and Kathy Vosburg in her official capacity as treasurer violated 52 U.S.C. § 30104(b)(3)(A). We received your response to the brief on August 31, 2017.

Pursuant to the Commission's *Agency Procedure Following the Submission of Probable Cause Briefs by the Office of the General Counsel*, 76 Fed. Reg. 63,570 (Oct. 13, 2011), OGC is notifying the Commission that it intends to proceed with these probable cause recommendations based on the factual and legal analysis set forth in the General Counsel's Brief. A copy of OGC's Notice to the Commission is enclosed.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Ana Peña-Wallace", is written over a horizontal line.

Ana Peña-Wallace
Attorney

Enclosure

Office of the General Counsel's Notice to the Commission

A copy of this Notice is being provided to Respondents at the same time that it is circulated to the Commission.

II. ANALYSIS

A. Respondents' Challenge to the Constitutionality of Spousal Contribution Limits is Meritless

The Act provides that "no person" shall make contributions that exceed the applicable limits of the Act.³ A "person" is defined as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons."⁴ Consequently, under the plain language of the statute, an immediate family member, including a spouse, is prohibited from making an excessive contribution. In their Response to the General Counsel's Probable Cause Brief, Respondents do not contest that they violated the excessive contribution limits but rather challenge the constitutionality of the provision as applied to their factual circumstances.

The Supreme Court in *Buckley v. Valeo* upheld the constitutionality of the Act's contribution limits as applied to members of a candidate's family, including a spouse.⁵ In *Buckley*, the Supreme Court rejected the lower court's interpretation that the Act "relax[ed]" the individual limits as to the candidate's immediate family, as well as the Commission's similar interpretation in Advisory Opinion 1975-65 (Bell), noting that "both the Court of Appeals and the Commission apparently overlooked the Conference Report accompanying the final version of the Act which expressly provides for a contrary interpretation."⁶ The Court cited to that report, stating: "It is the intent of the conferees that members of the immediate family of any candidate shall be subject to the contribution limitations established by this legislation."⁷

Since *Buckley*, the Commission has consistently applied the Act's contribution limits to a candidate's family members, including spouses.⁸ Respondents argue that *Buckley* is not binding in this matter because neither the Supreme Court nor any other court has "explicitly address[ed]"

³ 52 U.S.C. § 30116(a).

⁴ *Id.* § 30101(11).

⁵ *Buckley*, 424 U.S. 1, 53 n.59 (1976) (noting "the risk of improper influence" resulting from contributions made by family members are "somewhat diminished" but not "sufficiently reduced"). The statute at issue in *Buckley* defined "immediate family" to mean "a candidate's spouse, and any child, parent, grandparent, brother, or sister of the candidate and the spouses of such persons." *Id.* at 188 (reprinting text of the statutory provisions at issue, including 18 U.S.C. § 608 (a)(2) (defining "immediate family," in appendix to per curiam opinion)).

⁶ *Id.* at 51 n.57.

⁷ *Id.*

⁸ See, e.g., Factual and Legal Analysis at 6 n.24, MUR 6860 (Land); Factual and Legal Analysis at 5, MUR 6417 (Huffman); Factual and Legal Analysis at 5 n.1, MURs 6363 and 6440 (Friends of Frank Guinta); Factual and Legal Analysis at 13, MURs 5334, 5341, and 5524 (O'Grady).

1 the constitutionality of the Act's contribution limits as applied to spousal contributions."⁹
2 Further, relying, in part, on *McCutcheon v. FEC*,¹⁰ Respondents argue that the Act's contribution
3 limits as applied to the facts in this case are unconstitutional because "[s]pousal contributions do
4 not give rise to actual or apparent quid pro quo corruption."¹¹ Instead, Respondents assert that
5 Terri Lynn Land's spouse, Dan Hibma, made contributions to her campaign "out of loyalty and
6 support for his wife."¹²

7
8 Respondents point to no legal authority directly in support of their argument that *Buckley*
9 is not binding on spousal contributions, nor do they point to any court ruling that spousal
10 contributions are unconstitutional. Therefore, the Commission has given, and must give, the
11 provision full effect.¹³ In Advisory Opinion 2012-32 (Tea Party Leadership Fund) involving a
12 constitutional challenge to the Act's contribution limits at section 30116(a)(1)(A) and the
13 definition of a "multicandidate committee" at section 30116(a)(4), the Commission recognized
14 that it lacked the power to make a determination that those provisions were unconstitutional
15 because no court had invalidated them. Accordingly, the Commission stated that it "was
16 required to give these provisions full force."¹⁴ Likewise, in this case, no court has found that the
17 contribution limits as applied to spouses are unconstitutional, and therefore, the Commission
18 must give the provision its full effect. Accordingly, because Hibma has admitted to facts
19 indicating that he made excessive contributions to Land, Hibma violated 52 U.S.C.
20 § 30116(a)(1)(A), and Land and the Committee violated 52 U.S.C. § 30116(f).

21
22 **B. Respondents Do Not Contest That They Violated the Act's Disclosure**
23 **Provisions**
24

25 The Commission also found reason to believe that the Committee violated 52 U.S.C.
26 § 30104(b)(3)(A) by failing to identify Hibma as the contributor of the excessive contributions,
27 and the General Counsel's Brief argued that there was probable cause to believe that the
28 Committee violated that provision. Respondents, however, have not addressed this allegation in
29 their Response. As the General Counsel's Brief indicated, in a sworn affidavit, Hibma admitted
30 to transferring \$710,000 from his personal account to Land's personal account "for the purpose

⁹ Resp. to PC Br. at 3.

¹⁰ 134 S. Ct. 1434, 1450 (2014) (holding that only legitimate governmental interest for restricting campaign finances is "preventing corruption or the appearance of corruption").

¹¹ Resp. to PC Br. at 5.

¹² *Id.* at 6.

¹³ Advisory Op. 2012-32 at 3 (Tea Party Leadership Fund) (citing "*Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally outside an administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting in the context of the Commission's administrative enforcement process that '[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional)').

¹⁴ *Id.*

1 of providing funds for a check" for the Committee¹⁵ and thus acknowledged making
2 contributions to the Committee.¹⁶ Because the Committee failed to identify Hibma as the
3 contributor in its disclosure reports, the Committee violated 52 U.S.C. § 30104(b)(3)(A).

4
5 **III. RECOMMENDATION**

6
7 Find probable cause to believe that Dan Hibma violated 52 U.S.C. § 30116(a)(1)(A), that
8 Terri Lynn Land and Terri Lynn Land for Senate and Kathy Vosburg in her official capacity as
9 treasurer violated 52 U.S.C. § 30116(f), and that Terri Lynn Land for Senate and Kathy Vosburg
10 in her official capacity as treasurer violated 52 U.S.C. § 30104(b)(3)(A).

¹⁵ PC Br. at 3 (citing Affidavit of Dan Hibma ¶ 2 (May 19, 2017)).

¹⁶ See 52 U.S.C. § 30101(8)(A)(i) (defining contribution to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office").

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